

Saratoga County Chapter NYSARC, Inc. and Communications Workers of America, Local 1118, AFL-CIO, Petitioner. Case 3-RC-9987

July 28, 1994

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The National Labor Relations Board, by a three-member panel, has considered the determinative challenges in an election held June 18, 1993, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on May 21, 1993. The tally of ballots shows 18 ballots cast for, and 17 against, the Petitioner, with 5 challenged ballots,¹ a number sufficient to affect the election results.

The Board has reviewed the record in light of the Employer's exceptions and brief and makes the following findings.

The primary issue before the Board is whether the four on-call substitute bus drivers, David Dudley, Roland Dumas, James Mayette, and Susan Potter, worked a sufficient number of hours during the period prior to the election to demonstrate a community of interest with the unit employees. The four "on-call" substitute drivers were challenged by the Employer on the basis that they are irregular part-time or casual employees lacking a sufficient community of interest with the unit employees to be eligible to vote in the election. The hearing officer found that they were eligible to vote on the basis that they averaged at least 4 hours of work per week during the calendar year prior to the election. We do not agree with the formula used by the hearing officer and conclude, on the basis of the formula we find applicable, that none of the four employees was eligible to vote.

The Employer, Saratoga County Chapter NYSARC, Inc., is a not-for-profit social services agency that provides educational, vocational, residential, and custodial services to persons with mental retardation and developmental disabilities. Within its organizational structure, the agency's transportation department is responsible for transporting its client population to and from work and treatment sites.

The Petitioner seeks to represent a unit of all full-time, part-time, and substitute bus drivers, monitors, mechanics, and the dispatcher employed in the Employer's transportation department. At the time of the election, the transportation department had approximately 43 employees.

As a supplement to its regular drivers, the Employer uses "on-call" substitute drivers.² The on-call substitutes all work as full-time bus drivers for the area school districts. They are called to work by the Employer on an as-needed basis to cover for regular drivers who are absent. They are usually available to drive for the Employer only when the public school district is not in session. Specifically, they are available in the summer from the latter part of June to the early part of September, for a period of about 2 weeks over the Christmas-New Year's holidays, and for a period of about 1 week in about February and 1 week in about April.

The Employer recruits its on-call substitute drivers from the five public school districts in the area by posting its request or by notification to the districts' transportation managers. Dudley, Dumas, and Mayette were recruited in the summer of 1992, while Potter was recruited in the summer of 1990.

Because the on-call substitutes are employed on an as-needed basis to cover for planned and unplanned absences of regular drivers, they can decline work opportunities without consequence. Conversely, there is no guarantee of work opportunities made to them. The on-call drivers receive no fringe benefits and work at the lowest wage rate maintained by the Employer with no wage increase for seniority.

In determining whether on-call employees who perform work should be included in the bargaining unit, the Board considers the regularity of their employment. Employees are considered to have been regularly employed when they have worked a substantial number of hours within the period of employment prior to the eligibility date. Under the Board's longstanding and most widely used test for voter eligibility in these circumstances, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970). Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula is the one most frequently used, absent a showing of special circumstances.³

The hearing officer found that application of the formula set forth in *Davison-Paxon* would not account for the demand patterns of the employer that concentrate on-call hours during the summer. He found that using the usual *Davison-Paxon* formula would exclude employees who had substantial records of employment

¹ The hearing officer inadvertently placed the tally for the "challenged ballots" next to the line for "valid votes counted." The tally set forth above is the correct tally.

² Kathryn Prunier, who substituted as a bus driver, was challenged by the Board agent because her name did not appear on the eligibility list. The Regional Director, in his report on challenged ballots, recommended that the challenge to her ballot be overruled. No exceptions were filed to the Regional Director's recommendation, and it was adopted in the Board's October 22, 1993 decision.

³ *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992).

during the peak periods solely because of the timing of the election. The hearing officer found that equity dictates a modification of the formula. The hearing officer proposed that, in the special circumstances of this case, a 4-hour-per-week average be used but that the entire year prior to the eligibility date be taken into consideration. Taking into consideration the entire year, the hearing officer found that Dudley, Dumas, Mayette, and Potter all averaged 5 to 6 hours of work per week, thereby meeting the 4 hours-per-week threshold. The hearing officer thereupon recommended that the challenges to their ballots be overruled.

The Employer contends that the challenges to the ballots of Dudley, Dumas, Mayette, and Potter should be upheld because: (1) they did not work a sufficient number of hours under the *Davison-Paxon* guidelines; and (2) the average number of hours they worked establishes that they are, at best, irregular part-time employees.

In disagreement with the hearing officer, we find that there is no showing of special circumstances here which would warrant not applying the *Davison-Paxon* eligibility formula. The on-call drivers are used to substitute for absent drivers. The Employer needs the same number of drivers throughout the year to fulfill its obligations to the client population it serves. Thus, the need for substitutes is determined entirely by the number of employees who are absent as a result of vacations or illness. While the record is somewhat unclear, it appears that the Employer experiences an increased demand for substitutes during the summer months while unit employees are on vacation. In these months, the substitute drivers are available because they are not required to drive for the school districts where they are employed during the rest of the year. During that period, there is a convenient confluence between the Employer's demand and the on-call employees' availability and neither seems to be the controlling factor as to how many hours the on-call employees work. For the rest of the year, the on-call employees will work for the Employer to the extent that they are needed to substitute and they are available. Thus, at all times, the on-call employees will work for the Employer based on these two factors. It is simply that these two factors tend to be highest during the summer months.

Contrary to the hearing officer, we do not find that these facts are evidence of special circumstances that

warrant modification of the *Davison-Paxon* formula. We have found that the Employer's overall requirement for drivers does not fluctuate. Thus, although it is clear that the Employer has an increased need for substitute drivers during the summer vacation period, we have found that its requirement for the on-call substitute drivers is determined entirely by the number of regular drivers who are absent as a result of vacations or illness.⁴ In this circumstance, far from being a special case, the Employer is in no different situation from any other business that permits employees to concentrate their vacations during the summer months and hires temporary help to fill in during these absences. Accordingly, we find that the *Davison-Paxon* formula applies here. We further find that under that formula the four on-call substitutes are ineligible to vote in the election because they did not work the requisite 4 hours per week for the last quarter prior to the eligibility date.⁵ We therefore conclude that the challenges to their ballots should be upheld.

DIRECTION

IT IS DIRECTED that this case is remanded to the Regional Director for Region 3, who shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Kathryn Prunier and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

⁴ Accordingly, we find distinguishable *C.T.L. Testing Laboratories*, 150 NLRB 982 (1965), and *Daniel Ornamental Iron Co.*, 195 NLRB 334 (1972), both of which addressed the status of casual employees in a seasonal industry in which peaks and valleys of overall employment are the norm.

⁵ During the 13-week period prior to the May 14, 1993 eligibility date, Dudley averaged 3.4 hours of work per week; Dumas averaged 1 hour of work per week; Mayette averaged 1 hour of work per week; and Potter averaged 2.3 hours of work per week.